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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUL 13 2004

Federal Communications Commission
Office of Secretary

In the matter of		
A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems	)	MB Docket No. 04-207

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation
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Dated: July 13, 2004

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SUMMARY

In the *Notice* that initiated this proceeding, the Commission released several questions that amounted to nothing less than an unjustified frontal assault on the continuing need for must-carry and retransmission consent. Such an attack is unwarranted because must-carry is the key to preserving both localism and diversity in television markets nationwide and the free over-the-air broadcasting system itself. Moreover, must-carry – including multicast must-carry – remains the law of the land and must be enforced. But the most important characteristic of must-carry in this proceeding is that it has nothing to do with whether cable operators offer programming on an *a la carte* basis. Accordingly, the Commission should make the following findings in this proceeding:

- **Must-carry and retransmission consent have nothing to do with cable operators' desire or ability to offer their programming on an *a la carte* basis.**
- **Federal law takes the issue of offering broadcast offerings on an *a la carte* basis completely off the table and for good reason. Must-carry and retransmission consent are the law of the land, so broadcast channels should not be included in any discussion of cable *a la carte* programming.**
- **Rather than speculating about the reasons for cable operators' reluctance to offer *a la carte* programming, the FCC should carry out its responsibility to complete its six-year-old DTV must-carry and other DTV related proceedings.**

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COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("PCC")[1] hereby submits its comments in the above-captioned proceeding addressing the cable operators' ability and desire to offer their programming on an *a la carte* basis.[2]

INTRODUCTION

This proceeding should be focused on the practices of cable operators, but in a disturbing turn of events, the Commission inexplicably has focused its inquiry on the continuing need for must-carry and retransmission consent.[3] **The *Notice* thus finds the Commission asking the wrong questions at the wrong time.**

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[1] PCC owns and operates one of the largest television station groups in America, as well as PAXTV, a full-service, family-friendly, over-the-air television broadcast network. PCC supplies programming to cable operators and DBS providers across the country through its owned and operated stations, its affiliates, and where no PAXTV signal is available over the air, through voluntary carriage agreements. PCC has been a leader in the DTV transition, constructing more that 40 full-service DTV television stations and leading the way in DTV multicasting, an idea that PCC pioneered and that now has become commonplace.

[2] Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and direct Broadcast Satellite Systems, *Public Notice*, DA 04-1454, MB Docket No. 04-207 (rel. May 25, 2004) (the "*Notice*").

[3] PCC understands that the Commission must respond in a timely manner to questions posed by Congress, see Letter from Senator John McCain, Chairman, Senate Committee on Commerce, Science, and Technology to Chairman Michael K. Powell, dated May 19, 2004; Letter from Congressman Joe Barton, Chairman, House Committee on Science and Technology, et. al. to Chairman Michael K. Powell,

Any Report to be issued by the Commission to Congress as a result of this proceeding must take into account the following:

- **Must-carry and retransmission consent have nothing to do with cable operators' ability to offer their programming on an *a la carte* basis.**
- **The FCC should disabuse Congress of any notion that must-carry or retransmission consent are relevant to the *a la carte* issue.**
- **Must-carry and retransmission consent are the law of the land, so it makes no sense to include broadcast channels in any discussion of cable *a la carte* programming.**
- **Federal law takes the issue of offering broadcast offerings on an *a la carte* basis completely off the table and for good reason.**
- **Rather than speculating about the reasons for cable operators' reluctance to offer *a la carte* programming, the FCC should carry out its responsibility to complete its six-year-old DTV must-carry and other DTV related proceedings.**

The Commission's delay in resolving its six year old DTV must-carry proceeding and other important DTV issues is depriving broadcasters of the regulatory certainty necessary to plan their DTV transition. At a time of such grave uncertainty, it is shocking to find that the *Notice* is filled with backhanded suggestions that must-carry

dated May 18, 2004, but the questions in the Notice are framed in a way that is highly unlikely to illicit objective information that will be useful to Congress. One of the Commission's most important roles is to furnish Congress with objective information about the industries it regulates, but the Notice is so slanted against the interests of broadcasters that it is unlikely to generate anything other than hollow rhetoric from cable operators and furious defenses from broadcasters.

and retransmission consent – the lifelines that ensure broadcasters' access to television audiences on fair terms – are part of the reason that cable operators do not offer their services on an *a la carte* basis. The clear – but totally false – implication of these two issues is that must-carry may have to be sacrificed to achieve cable *a la carte* programming.

To the contrary, the only current "problem" with must-carry is that the Commission has failed to adhere to the plain meaning of the statute by not requiring full digital multicast must-carry. The Commission's unjustified failure to resolve this issue has brought the DTV transition to a virtual standstill as broadcasters have been unable to finalize or even develop DTV business plans while cable-affiliated programmers have been free to develop vast quantities of digital programming to accomplish an early dominance of the DTV market. If the Commission were being guided by law rather than an apparent desire to pick the winners in the video distribution market, it would long ago have confirmed that must-carry applies to broadcasters' full digital broadcast signal, not simply to a single sliver of that signal as the Commission tentatively and erroneously found in January of 2001.[4] The Commission's delay in ordering full digital multicast must-carry is inexcusable and, by initiating the current proceeding linking must-carry to *a la carte* programming while that issue remains pending, the Commission is bordering on dereliction of its duty to the public interest.

[4] Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 (2001) ("*First DTV Must-Carry Order*").

I. MUST CARRY IS THE LAW OF THE LAND AND IT PRECLUDES A LA CARTE CARRIAGE OF BROADCAST STATIONS.

The central point the Commission must recognize in this proceeding is that must-carry and retransmission consent are the law of the land, so it is senseless to include local broadcast channels in any discussion of cable *a la carte* programming. Indeed, the most outrageous question contained in the *Notice* is whether cable operators would comply with the must-carry law if they carried all broadcast channels on an *a la carte* basis.[5] The question itself exhibits a total ignorance of the 1992 Cable Act and its history. Both the language and the substance of the 1992 Cable Act[6] and the *Turner* cases[7] confirm that broadcast television offered over cable cannot be part of the discussion of *a la carte* programming.

Section 614 of the 1992 Cable Act explicitly states that "[s]ignals carried in fulfillment of the [must-carry] requirements . . . *shall be provided* to every subscriber of a cable system."[8] It should go without saying that if a cable operator merely makes available a local broadcast signal for viewers to order, that signal is not being provided to every subscriber. Even more explicitly, Section 623 requires cable operators to offer all "subscribers a separately available basic service tier to which subscription is required for access to any other tier of service . . . consist[ing] of . . . *[a]ll signals carried in fulfillment of the [must-carry] requirements.*"[9] **As a matter of pure statutory**

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[5] *Notice* at 3.

[6] Cable Television and Consumer Protection and Competition Act Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

[7] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[8] 47 U.S.C.A. § 534((b)(7) (emphasis added).

[9] *Id.*, § 543(b)(7) (emphasis added).

construction, these provisions absolutely foreclose allowing cable operators to offer broadcast channels on an *a la carte* basis.

But this matter goes well beyond simple statutory construction deep into the heart of the policies underlying must-carry. Congress sought through must-carry to preserve and protect the national free over-the-air broadcasting system and the Supreme Court thoroughly accepted and approved that aim.[10] Congress recognized that the only way to accomplish this goal was to protect broadcasters' access to cable homes.[11] Moreover, Congress rejected complicated alternatives to requiring must-carry, such as the A/B switch, recognizing that consumers would be unlikely either to understand their importance or to make use of them.[12] The same would be true of allowing cable operators to carry broadcast stations *a la carte*. By adopting must-carry, Congress recognized that the preservation of the full range of existing television broadcasting services is a national policy and rejected the idea that it should be subject to the individual market choices of consumers.[13]

Consequently, federal law takes the issue of offering broadcast offerings on an *a la carte* basis completely off the table, and for good reason. Must-carry was deemed by the Congress and by the Supreme Court to be necessary to the continuation of a free over-the-air broadcasting system.[14] That determination is not subject to reconsideration in this or any other Commission proceeding.

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[10] 1992 Cable Act, §§ 2(a)(11)-(19); *Turner II*, 520 U.S. 189-190.

[11] 1992 Cable Act, § 2(a)(15).

[12] *Id.* at § 2(a)(18).

[13] *Turner II*, 520 U.S. 192-93.

[14] 1992 Cable Act, §§ 2(a)(11)-(19); *Turner II*, 520 U.S. 189-190.

II. MUST-CARRY AND RETRANSMISSION CONSENT HAVE NO IMPACT ON CABLE OPERATORS' DESIRE OR ABILITY TO OFFER THEIR PROGRAMMING ON AN *A LA CARTE* BASIS.

There is no logical basis for linking must-carry to cable operators' choice to offer programming in tiers rather than *a la carte*. Cable operators offer their programming in tiers to control their programming costs, increase their revenue from customers, and maximize their profits,[15] not as a response to the requirement that they transmit must-carry and retransmission consent stations. By requiring consumers to take cable programming they may not want, cable operators are able to charge their customers higher rates and keep program licensing fees low by guaranteeing advertisers that their commercials will be carried on cable channels reaching every home in the operators' service area.[16] These practices are not made any more or less feasible by must-carry or retransmission consent.

Far from being an impediment to consumer choice, must-carry is one of the main drivers of localism and program diversity on cable systems. As Congress and the Supreme Court have found, without must-carry, cable operators likely would eliminate much of the local broadcast programming that currently is carried on cable systems. Without cable carriage, many dropped stations would fail, so it is no exaggeration to say that must-carry is the key regulation to maintaining a diversity of programming both over-the-air and via cable. Accordingly, must-carry is a major piece of consumer-welfare legislation that simultaneously serves the highly important government interest

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[15] *The Pitfalls of a la Carte: Fewer Choices, Less Diversity, Higher Prices*, National Cable and Telecommunications Association Policy Paper, at 6 (May 2004).

[16] *Id.*

in protecting localism, diversity, and competition in both local and national television distribution markets.

Must-carry and retransmission consent also provide broadcasters with the means to protect themselves from the anticompetitive conduct of cable operators, which in the past has included dropping stations, abruptly changing their channel position, and numerous other unfair practices.[17] By protecting themselves from this conduct, broadcasters protect viewers' access to the full rage of television broadcast stations. The *Notice* attempts to turn around the consumer-welfare issue by insinuating that viewers might prefer not to receive broadcast programming.[18] This suggestion is irresponsible because the FCC has no basis for presenting such a conclusion to Congress and it is pointless because the Communications Act requires must-carry. In any case, all the available evidence of whether or not MVPD viewers want broadcast channels suggests that they do. For example, satellite subscribership did not reach the stratospheric levels it currently enjoys until it gained the right to carry local broadcast channels.[19]

Sections III and VII of the *Notice* also imply that broadcasters are somehow abusing their must-carry/retransmission-consent rights by bargaining for carriage of affiliated programming channels.[20] This claim is spurious, and, in any case, the issue is irrelevant to the vast majority of broadcasters. First, most broadcasters do not have

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[17] *See Turner II*, 520 U.S. at 208-213.

[18] *Notice* at 2.

[19] Annual Assessment of the Market for the Delivery of Video Programming, *Tenth Annual Report*, 31 CR 700, ¶ 65 (rel. January 28, 2004).

[20] *Notice* at 2, 3.

separate affiliated programming channels. Like PCC, these broadcasters are struggling through a very expensive and so-far unremunerative DTV transition. It is highly disingenuous for the FCC to focus its inquiry in this proceeding on the few broadcasters that have the financial wherewithal to resist the anticompetitive practices of the major cable operators. All those broadcasters are doing is trying to level a distorted playing field – and, in any case, the vast majority of broadcasters have no such economic power. By focusing attention on the few broadcasters with the bargaining power to strike fair retransmission consent deals with cable operators, the FCC is only deflecting attention from the much larger group of broadcasters (and their much-larger group of viewers) that need the FCC's regulatory assistance.

Second, strangely absent from the FCC's questions is whether cable operators' reluctance to offer programming on an *a la carte* basis stems from an unwillingness to jeopardize the viability of their own affiliated programming networks. This is an obvious possibility, but somehow, the *Notice* misses it. Cable operators are the dominant television service providers in practically every market in the country.[21] They leverage their market power to force viewers to accept dozens of channels – many of which are affiliated with the cable operator itself – as a condition of receiving the few cable services they actually want.[22] Thus, bundling all program networks together – both affiliated and unaffiliated – insulates cable operators' affiliated networks from competition and ensures that they will not fail. This is the most logical reason why cable

[21] Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, ¶ 161 (2002).

operators would avoid *a la carte*, which makes it doubly puzzling that the FCC would focus on the supposed role of mandatory carriage of broadcast channels in its development of this issue. Any link between must-carry and *a la carte* is pure fiction, and the Commission must clearly convey that fact to Congress.

III. THE COMMISSION SHOULD BE IMPLEMENTING CONGRESS'S WILL BY ENSURING FULL DIGITAL MULTICAST MUST-CARRY RATHER THAN QUESTIONING THE VALUE OF MUST-CARRY.

While the FCC trifles with loaded questions about must-carry and *a la carte*, the DTV transition continues to languish and important regulatory problems remain unsolved. The DTV must-carry proceeding is now 6 years old.[23] More time has passed since the FCC released its tentative (and erroneous) decision against multicast must-carry than remains before the FCC reaches Congress's legislative end-date for the transition.[24] Nonetheless, the FCC continues to allow a whole host of important regulatory issues to remain unresolved, including resolution of the 2002 DTV Biennial Review, meaning that the answers to essential questions regarding channel election and other operational issues remain mysteries.[25] This leaves broadcasters' DTV transition plans up in the air at a time when certainty is most needed. Not even the

[22] P.J. Bednarski, *More than I Can Watch: The Number of TV Channels Is Growing Faster Than Our Interest*, BROADCASTING AND CABLE, July 9, 2001, at 18 (citing Nielsen Media Research study showing that customers that receive over 100 channels regularly watch only 17).

[23] Carriage of the Transmissions of Digital Television Broadcast Stations Amendments to Part 76 of the Commission's Rules, *Notice of Proposed Rulemaking*, 22 CR 2233 (rel. July 10, 1998).

[24] Only 899 days remain until Congress intends the DTV transition to be complete. *See* 47 U.S.C.A. § 309(j)(14)(A). It now has been 1274 days since the Commission released its Report and Order in the DTV Must Carry Proceeding. *See* Carriage of Digital Television Broadcast Signals, *First Report and Order and second Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 (rel. January 23, 2001).

[25] Second Periodic Review of the Commission's Rules and Policies Affecting the Transition to Digital Television, Notice of Proposed Rulemaking, MB Docket No. 03-15, RM 9832, MM Docket Nos. 99-360, 00-167, 00-168, FCC 03-8 (rel. Jan. 27, 2003).

FCC is taking this target-date seriously anymore, as even the much-publicized "Ferree Plan" would have the transition complete no earlier that 2009.[26]

As PCC has shown on many occasions, the single best way to ensure a quick transition is to ensure full digital multicast must-carry. Accordingly, rather than entertaining doubts about the continuing efficacy of must-carry, the FCC should be working to give full effect to the statute by completing its DTV must-carry proceeding. Here again, the decisions of both Congress and the Supreme Court require Commission action to guarantee that every local full-power broadcast signal is carried. **The statute says that *ALL* signals must be carried without degradation so long as they occupy no more than one-third of cable system channel capacity.**[27] These provisions plainly require full digital multicast must-carry and any conclusion to the contrary would contravene the express will of Congress and the approval of the Supreme Court. But rather than carry out the clear commands of the statute, the Commission has delayed resolution of this proceeding for six years, now diverting its attention to *a la carte* programming while the DTV transition languishes.

The suggestion in the *Notice* that must-carry and retransmission consent may harm program diversity further shows the Commission's misplaced priorities in this proceeding.[28] The Commission's suggestion that must-carry undermines programming diversity is ironic because by ignoring the Cable Act's requirement of full digital multicast must-carry, the Commission is forsaking an opportunity that would guarantee the

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[26] Glenn Maffei, *Ferree Plan's Warm Welcome*, BROADCASTING AND CABLE, June 7, 2004.

[27] 47 U.S.C.A. §§ 534(a), (b)(1)(B), (b)(3), (b)(7); 543(b)(7).

[28] *Notice* at 2.

greatest one-time expansion of all forms of programming diversity in the history of television. If the Commission were truly interested in fostering diversity, it would order full digital multicast must-carry without delay rather than waste its time questioning the continuing worth of must-carry.

V. CONCLUSION

Any report generated by this proceeding should **disabuse Congress of any notion that must-carry and retransmission consent are relevant to the *a la carte* issue.** Congress has instructed the Commission to regulate broadcast and cable television in a way that preserves the vibrancy of the national free over-the-air programming system. Contrary to this mandate, the *Notice* and the questions it contains indicate that the Commission intends to embark upon a pro-cable, anti-broadcast regulatory strategy that threatens the long-term viability of free television. The Commission must reverse this course and emphasize to Congress that must-carry and retransmission consent remain an integral part of broadcasting and cable regulation and that any *a la carte* programming requirement should have no effect on the existing must-carry rules.

Like so many other issues before it, cable a la carte programming is just another distraction from the FCC's important business of ensuring a swift DTV transition that improves the free television service for all Americans. As PCC has long maintained, multicast must-carry is a crucial piece of the DTV puzzle and should be enacted without further delay. The FCC should inform Congress that must-carry and retransmission consent do not inhibit the offering of cable *a la carte* programming and that, to the

contrary, must-carry – including full digital multicast must-carry – remains an integral feature of a fair market for the distribution of video programming.

Respectfully submitted,

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Dated: July 13, 2004